United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

To be argued by:
William J. Dreyer

76-1303
76-1315

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P/S

In The

United States Court of Appeals

For the Second Circuit

UNITED STATES OF AMERICA,

Appellee,

against

PETER M. LAZARSKI, CRAIG L. NEWMAN, NEIL B. WINNER, and YOK LEE,

Appellants.

UNITED STATES OF AMERICA,

Appellee,

against

MARK MC DONALD,

Appellant.

Appeal from the United States District Court
for the Northern District of New York

BRIEF FOR APPELLEE

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ISSUES PRESENTED

1. Whether the affidavit underlying the warrant contains a certain class of missta!ements requiring suppression of evidence derived from the warrant.

2. Whether the affidavit was sufficient to warrant a finding of probable cause for the issuance of the search warrant.

3. Whether hearsay declarations were improperly included within the affidavit.

STATEMENT OF THE CASE

Nature of Case and Course of Proceedings

During the early morning hours of December 19, 1975, Agents of the Drug Enforcement Administration arrested Defendants Lazarski, Newman, Winner and Lee, after a search warrant issued by United States Magistrate John Spain, Troy, New York, had been executed at the rented home of defendant, Peter M. Lazarski.

On December 29, 1975, Defendants Lazarski, Newman, Winner and Lee, were charged in a Two-Count indictment with unlawfully manufacturing approximately 80 pounds of methaqualone, in violation of 21 United States Code, Section 841 (a)(1), and unlawfully conspiring to manufacture and distribute methaqualone in violation of 21 United States Code, Section 846. On February 4, 1976, Defendant McDonald was similarly charged in a separate indictment. On April 5, 1976, indictments were consolidated upon motion of the United States.

After indictment, all Defendants moved to suppress evidence obtained as a result of the search. Following a suppression hearing before the Honorable James T. Foley and the latter's denial of defendants' motion to suppress, each defendant pleaded guilty to the conspiracy count of the indictment in which he was charged. On June 26, 1976, the defendants were sentenced as young adult offenders to the custody of the Attorney General. The defendants appeal from the order (A-314)[1] of Judge Foley denying defendants' motions to suppress evidence.

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[1] "(A-)" refers to the joint appendix and appropriate pages therein.

STATEMENT OF FACTS

On December 18, 1975, the Honorable John Spain, United States Magistrate, Troy, New York, issued a warrant for the search of 209 Wolf Road, Colonie, New York, upon the affidavit of Special Agent Raymond W. Tripp, United States Department of Justice, Drug Enforcement Administration (hereinafter DEA).

The affidavit of Mr. Tripp (A-19) avers the following essential facts:

(1) On December 11, 1975, DEA Agent William T. Healey, posing as an employee of the BASF Wyandotte Corporation, a chemical supply house in Newark, New Jersey, assisted defendant Newman and an unidentified individual, later identified as Yok Lee, in loading 2200 pounds of anthranilic acid from the chemical company warehouse into a Hertz Rental Truck bearing New York license 8106GA. Purchase orders showed that the quantity of anthranilic acid was ordered by the Wilmington Farm Co-Op, 10 Bryant Hill Road, Wilmington, Vermont (A-20).

(2) On the same day Agent Healey and others followed the said Hertz Truck from the Port of Newark to 209 Wolf Road, Town of Colonie, New York. Healey, Agent Tripp, and others observed the aforementioned bags of anthranilic acid being unloaded into the garage at 209 Wolf Road, and further, observed Craig Newman and the unidentified individual return the truck to a Hertz Rental Agency in Troy, New York. On the same day, another DEA Agent observed that the name on the house was "Lazarski" (A-21).

(3) On the same day, while on surveillance at 209 Wolf Road, Agent Tripp observed an automobile arrive at 209 Wolf Road. A check with the Department of Motor Vehicles, State of New York, showed that the automobile was registered to defendant Neil Winner (A-21).

(4) On December 12, 1975, Agent Tripp observed that windows at 209 Wolf Road were boarded up and that other windows were covered by cardboard or closed venetian blinds (A-22).

(5) On December 18, 1975, Agent Tripp learned from Richard Pratt, Chief of the Wilmington Police Department that there is no record of a Wilmington Farm Co-Op, a Bryant Hill Road, or a James Ewing (the name on a purchase order previously used) in Wilmington, Vermont. He also learned from telephone authorities in Vermont that the telephone number appearing on one of the purchase orders used to purchase anthranilic acid was fictitious (A-22 to A-23).

(6) Between December 12, 1975, and December 18, 1975, Paul DeZan, Chemist United States Department of Justice, Drug Enforcement Administration, Northeast Regional Laboratory, New York City, advised Special Agent Sturrock of the ingredients of methaqualone. He advised that anthranilic acid is a precursor to methaqualone or mecloqualone; that anthranilic acid is combined with acetic acid or acetyl anhydride to produce acetyl-anthranilic acid, which is then combined with ortho-toluidine and "chloryl chloride" and heated to produce methaqualone. Chemist DeZan also advised that besides the manufacture of methaqualone and mecloqualone, the only other uses for anthranilic acid would be in the manufacture of analgesic drugs and certain veterinary products (A-22).

(7) On December 15, 1975, Agent Tripp, pursuant to a DEA subpoena, received telephone toll receipts for phone numbers in the name of defendants Lazarski, Newman, and Winner. From Mr. Lazarski's phone number calls were placed to the SGA Scientific Supply Company, Bloomfield, New Jersey on November 4, 5 and 21, 1975 and to the Conso Lab Supply Company, Westbury, New York, on November 21, 1975. From Mr. Winner's telephone number calls were placed to the

Anachemia Chemical Company, Champlain, New York; Albaniel Dye and Chemical Company, Jersey City, New Jersey; Atlantic Chemical Company, Nutley, New Jersey; and the Sandoz Pharmaceutical and Chemical Company, Whippany, New Jersey; the said telephone calls being placed on July 16, 18 and 25th, 1975. Calls from the telephone of Craig Newman were placed to the Conso Lab Supply Company on June 22nd and 23rd, 1975, and July 7th, 10th, 16th and 25th, 1975.

(8) On December 17, 1975, Agent Tripp learned from another DEA Agent that Craig Newman had obtained from the Conso Lab Supply Company in May of 1975 four kilos of anthranilic acid, and, in June, 1975, 56 pounds of Acetic Acid; and, further that on either July 18th or August 19th, 1975, Craig Newman picked up quantities of ether, sodium, sodium acitate, and acetyl anhydride, and ordered 48 kilos of ortho toluidine in June, 1975, the said substance not being picked up because it was back-ordered by the company (A-24).

(9) Finally, Agent Tripp learned that Peter Lazarski is a chemical technician at the Hudson Valley Community College and that the quantity of anthranilic acid delivered to 209 Wolf Road had not been removed from the garage or house (A-24).

On April 5 and 6th, 1976, a suppression hearing was held before the Honorable James T. Foley. The defendants contended that the affidavit of Agent Tripp failed to supply the United States Magistrate with sufficient probable cause to support the search warrant. Specifically, the defendants asserted that certain misstatements in the affidavit were material to a determination of probable cause and that without the said misstatements the search warrant should not have been issued.

Dr. Frank Soa was called by the defense and qualified as an expert in the field of chemistry. On direct examination he initially directed his attention to paragraph 3(g)(2) of the affidavit which states that besides the manufacture of

methaqualone and mecloqualone, the only other use for anthranilic acid is in the manufacture of analgesic drugs and certain veterinary products. Dr. Soa stated that the statement contained therein was incorrect in that anthranilic acid is used in a wide variety of industrial products, to include dyes, food stuffs anti-oxidants, fungicides, and other products (A-159 to A-64). According to Dr. Soa, the use of anthranilic acid in those products set forth in paragraph 3(g)(2) is minimal as compared to its use in other products (A-160).

Secondly, Dr. Soa examined paragraph 3(g)(1) and stated that the formula set out therein for the manufacture of methaqualone and mecloqualone was incorrect (A-166 to A-167).

On Cross Examination, Dr. Soa stated that the formula set forth in paragraph 3(g)(1) would be correct if the term "phosphorous trychloride" were substituted for "chloryl chloride" (A-177).[2] Dr. Soa then agreed that paragraph 3(g)(1) correctly listed other essential precursors in the manufacture of methaqualone to include, anthranilic acid, acetic acid and/or acetic anhydride and ortho-toluidine, (A-179 to A-180).

Dr. Soa further testified that while anthranilic acid is used widely in the manufacture of lawful products, the range or scope of such products is continually narrowed when the acid is combined with given chemical substances. Other than methaqualone, Dr. Soa could state only that some other substances may be produced from a combination of anthranilic acid, acetic acid, acetic anhydride, and ortho-toluidine (A-81 to A-182).

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[2]The Government here points out that Dr. Soa's admission that there is no such chemical as "chloryl chloride" (A-182) and the fact that paragraph 2 of the affidavit, wherein Agent Tripp included "phosphoryl chloride" as an ingredient in the manufacture of methaqualone, whereas the term chloryl chloride is omitted from said paragraph 2, support the proposition later asserted that the inclusion of the word "chloryl chloride" in paragraph 3 (g)(1) was a result of either a typographical error or an error in transmitting the formula to the affiant.

With respect to paragraph 3(g)(2), Dr. Soa stated that while anthranilic acid is widely used in industrial products, it is, in fact, used in analgesic drugs and veterinary products, as so stated (A-174 to A-175). The inaccuracy of paragraph 3(g)(2) lies in the assertion that the acid's use is limited to three or four products (A-175). William Timm was then called by the defense and qualified as an expert in the field of chemistry. Mr. Timm echoed Dr. Soa's assertion that paragraph 3(g)(2) failed to set forth the wide variety of uses of anthranilic acid and, as a result of these omissions, was false (A-188). He also agreed that paragraph 3(g)(1) was incorrect because, in his opinion, there was no such substance as "chloryl chloride." (A-192). On cross-examination, Mr. Timm stated that paragraph 3(g)(1) correctly listed four substances used in the manufacture of methaqualone, specifically, anthranilic acid, ortho-toluidine, acetic anhydride, and/or acetic acid (A-205). Mr. Timm also agreed with Dr. Soa that the range of substances which may be produced from anthranilic acid narrows when the acid is combined with a specific group of chemicals. Asked about the combination of anthranilic acid, acetic acid, acetic anhydride, ortho-toluidine, and phosphorous trychloride, Mr. Timm was unable to say what, if any, substances other than methaqualone could be produced (A-207). He then conceded that the inclusion of the term "chloryl chloride" was a possible typographical error (A-207). Concerning the common nature of anthranilic acid, Dr. Timm agreed that 2200 pounds of anthranilic acid is neither commonly found in the home nor in a chemistry basement of a hobbyist chemist (A-206). Both Dr. Timm and Dr. Soa testified that many researchers in the chemical industry use clandestine or secretive measures to conceal their activities from competitors. On Cross Examination, however, Dr. Timm conceded that it would be unusual for a college or university researcher to cover up what he is doing (A-202). Additionally, if the college or university chemist were working for a client, it would be unusual for such a researcher to share his work activity with other persons not engaged in this specific research (A-202-A-203).

In rebuttal, the government called Paul DeZan, chemist, United States Department of Justice, Drug Enforcement Administration. On direct examination, Mr. DeZan examined paragraph 3(g)(1) of the subject affidavit and stated that he did so provide Mr. Sturrock on the recited dates with the names of chemicals required for the manufacture of methaqualone, except that he advised Mr. Sturrock that "phosphorous or phosphoryl trichloride" was the fourth precursor required (A-227). He testified that he never heard of "chloryl chloride" and agreed that the latter's inclusion in paragraph 3(g)(1) was either a typographical error or an error made in receiving his telephonic instructions (A-227). Mr. DeZan pointed out that the probability that it was a typographical error is strengthened by the fact that in paragraph 3(g)(1) the term "acetyl anthranilic acid" (line 7) is incorrectly typed as "acetyl anthacilic acid." Moreover, Mr. DeZan advised Sturrock that "orthochloroaniline" and a reagent can be combined with acetyl anthranilic acid to produce "mecloqualone," whereas the affidavit contains, line 8, another apparent slip by the substituting "methaqualone" for "mecloqualone" (A-228).

With respect to paragraph 3(g)(2), Mr. DeZan testified that at the time he provided Mr. Sturrock with requested information, it was his opinion that the only uses for anthranilic acid were as stated in said paragraph (A-225). On direct examination he characterized paragraph 3(g)(2) as a fair representation of what he told Sturrock. He then testified that during the time in question he did not deliberately fail to tell Sturrock about other uses of anthranilic acid (A-225). On cross-examination, Mr. DeZan stated that he recalled telling Sturrock that "as far as I know," the only other uses of anthranilic are as stated in paragraph 3(g)(2) (A-238). Additionally, Mr. DeZan testified that before he told Mr. Sturrock about the said uses of anthranilic acid he conducted some research, but none which disclosed the variety of industrial uses of anthranilic acid (A-234 to A-239).

Finally, Mr. DeZan testified that while he was aware that Sturrock was engaged in an investigation concerning a large shipment of anthranilic acid to this District, he was not aware that his statements specifically were being used to prepare an affidavit for a search warrant. Moreover, he stated that he exercised the same degree of care in providing advice to Sturrock that he would have used in the preparation of his own affidavit.

ARGUMENT

POINT I

The affidavit underlying the warrant contains neither misstatements nor inaccuracies requiring suppression of evidence derived from the warrant.

It is the position of the defendants that paragraph 3(g)(2) of the affidavit for search warrant contains misstatements concerning the use of anthranilic acid and that the misstatements were (a) material to a finding of probable cause; (b) negligently recorded by the affiant; and (c) negligently made by chemist DeZan, the source of the information.

The government urges that (a) the District Court was correct in holding (A-321 to 322) that inaccuracies in paragraph 3(g)(2) were not material to the finding of probable cause; (b) paragraph 3(g)(2) contained information which the affiant and magistrate had reasonable grounds for believing; (c) a finding of negligence or non-negligence as to chemist DeZan is not required by applicable law; and (d) Chemist DeZan did not wilfully or deliberately omit or distort information.

In this circuit, the Court of Appeals has divided the issue of misstatements into two component parts. First, there is a distinction made between a misstatement by an affiant and a misstatement by a third party who supplies information upon

which the affiant subsequently relies in his sworn statement. *U.S. v. Sultan*, 463 F. 2d 1066 (2d Cir., 1972); *U.S. v. Gonzales*, 488 F. 2d 833 (1973); *United States v. Pond*, 523 F. 2d 210 (2d Cir., 1975). Second, this Court, within the context of the affiant-third party relationship, has recognized five variables in considering the validity of warrants issued upon affidavits containing misstatements. The misstatement may be (1) material or (2) immaterial; and it may be made (3) innocently, (4) negligently, or (5) deliberately. *Gonzales*, supra, at 837.

1. The *affiant - third party relationship.*

With respect to the first issue, this Court has held that a search warrant should not be set aside if information supplied by third parties and upon which an affiant-agent relies is later shown to be erroneous. In *Gonzales*, supra, at 837, the Court stated:

> Prior case law in this circuit speaks to this issue only in passing. In *United States* v. *Bozza*, 365 F. 2d 206, 223-224 (2d Cir. 1966), the court appeared to say that a negligent misstatement (by an affiant) would upset a warrant only if that misstatement was material. In *United States v. Perry*, 380 F. 2d 356, 358 (2d Cir.), cert. denied, 389 U.S. 943, 88S. Ct. 307, 19 L. Ed. 2d 299 (1967), the court stated that it is sufficient support for a warrant that "... the facts alleged by the informant, if true establish illegality and the affiant-agent has reasonable grounds for believeing in the truth of the allegations."

In *U.S. v. Pond*, supra, the Court's scrutiny was limited to the honesty and intent of an affiant-agent who made the mistaken assertion that "an informer had relied on the disproportionate ratio of baggage weight to size" as well as odor to detect marijuana. Finding that the affiant's error was, at most, negligent, the Court deleted the statement and found probable cause. In *U.S. v. Sultan*, supra, the Court stated:

> "... probable cause is not defeated (even when) an informant is later proved to have lied, as long as the affiant accurately represented what was told him."

Other circuits have expressed approval of such an approach. *U.S. v. Damitz*, 495 F. 2d 50 (9 Cir. 1974); *U.S. v. Marihart*, 492 F. 2d 897, 900 (8th Cir. 1974). See also, *Rugendorf v. U.S.*, 376 U.S. 528, 533 (1964). The defendants concede that still other circuits have adopted a stricter approach (appellate brief p. 7). The rationale of this circuit's *Pond-Gonzales* standard is expressed in *U.S. v. Carmichael:*

> Evidence should not be suppressed unless the trial court finds that the government agent was either recklessly or intentionally untruthful. A completely innocent misrepresentation is not sufficient for two reasons. Most importantly, the primary justification for the exclusionary rule is to deter police misconduct, and good faith errors do not negate probable cause. If an agent reasonably believes facts which on their face indicate that a crime has probably been committed, then, even if mistaken, he has probable cause to believe that a crime has been committed. Such errors are likelier and more tolerable during the early stages of the criminal process, for issuance of a warrant is not equivalent to conviction. p. 988.

In Kipperman, "Inaccurate Search Warrant Affidavits as a Ground for Suppressing Evidence," 84 Harvard Law Review, 825, at 832 (1971), it was stated:

> A final category to be considered is an "innocent" misrepresentation by the affiant. This class contains both unintentional and nonnegligent misstatements of personal observation as well as reasonable reliance on an informer who turns out, for whatever reason, to have misstated the true facts. Even if the error here is material, exclusion of competent evidence seems inappropriate. It is true that the warrant will have been issued on inaccurate data, but the fourth amendment

> has been read not to proscribe "inaccurate" searches, but rather only "unreasonable" ones. And a warrant based on information which the affiant and the magistrate both had reasonable grounds for believing is a reasonable one. To require agents to "know" facts that they cannot reasonably be expected to know would not deter any searches, since the agents must work with the reasonably believeable evidence before them. Such a rule would also allow at least some defendants to escape otherwise certain conviction merely because the police cannot operate with perfect knowledge in every case.

In the instant case, it is reemphasized that the affiant was Agent Tripp, whereas the information whose accuracy is attacked was provided through Agent Sturrock by Chemist DeZan. Although the District Court did not reach the issue of the accuracy of the affiant's reporting due to its finding that any erroneous information in paragraph 3(g)(2) was immaterial, the government addresses the issue herein in response to the defendants' appellate assertion that the affiant was negligent (appellate brief, p. 4).

With regard to the affiant's role, Chemist DeZan testified that paragraph 3(g)(2) was a fair representation by Agent Tripp of what DeZan told Sturrock. The defendants contend that the omission of the words "as far I know" to qualify DeZan's knowledge of the lawful uses of the anthranilic acid constitutes a misrepresentation by the affiant. Since the conclusions of experts are, in essence, the opinions of those experts, Agent Tripp should be permitted to rely upon the opinions of an expert who services the Drug Enforcement jurisdiction of Mr. Tripp. Moreover, the exclusion of the words "as far as I know," can hardly be said to constitute, as a matter of law or fact, a misstatement since the phrase is essentially synonymous with the phrases "in my opinion" or "to the best of my knowledge." The government contends that it is unreasonable to give credence to a defense proposition that the reviewing Magistrate would have rejected the affidavit or called for more information

if he had before him the words "as far I know." Not only does the proposition require the drawing of an intangible assumption, but compels this court to view the paragraph in the hypertechnical manner frowned upon by reviewing Courts (See Point II). Accordingly, insofar as Mr. Tripp is concerned, the government urges that the affiant acted honestly and was accurate when he wrote in 3(g)(2) the information relayed to him.

The defendants further urge (appellate brief, p. 6) that if the affiant's accuracy passes the appellate test, the Court go beyond the final step urged by the government and scrutinize Chemist DeZan.

Since defense Chemists testified that anthranilic acid has a wider variety of uses than Mr. DeZan believed, the defendants apparently assert that DeZan's conclusion set forth in paragraph 3(g)(2) is negligent, even grossly negligent, and that the exclusionary rule somehow extends past the accurate reporting of the affiant to the witness who lies, misstates a material fact, or is negligent in reporting his facts or conclusions. Although the government does not concede the Chemist DeZan was negligent, there are, nevertheless, several objections to permitting the defense's position to obtain. First, it is clear that the exclusionary rule, as it is currently applied in this and other circuits (See *Perry*, supra,) will not extend past even the honest affiant to government informers who may lie or negligently misstate information. Yet, government informers, by virtue of their position in the midst of criminal activity and despite the requirement that their reliability be established are the persons most likely to misrepresent information since they are clothed with a privilege of confidentiality and often have a personal interest in the outcome of a given case. In the instant case, the attack is not upon the reliability of an informer, but upon the alleged shoddy scholarship of a chemist who, although a government employee, is neither an investigator nor a "brother officer", and demonstrated no interest in the outcome of the

case, no knowledge of the specific reasons for which his opinions were sought, and no propensity to deliberately or intentionally misstate the facts. Thus, the government urges that since there is no rule of law which applies fourth amendment restrictions to informers, then *a fortiori* there should be no compelling reason to adopt a different rule in this case where the underlying statement of an identifiable person is neither a fabrication nor a willful or deliberate misrepresentation.

Moreover, the government contends that the negligence or non-negligence of a government chemist who provides what he believes to be good faith opinion information to police officers engaged in a prudent but necessarily hasty investigation cannot be objectively measured by the different opinions of chemists produced by the defense. The law of warrants recognizes that preparation of the affidavit may be hasty, that police knowledge cannot be perfect, that evidence may not be sufficient to convict, and that inaccurate data may be contained with the affidavit. The Court should not be compelled by a defense proposition to hold Chemist DeZan to a higher standard of care than would be required by the fourth amendment of police officers and agent-affiants. Chemist DeZan provided his information in good faith, without deliberate omission of material facts, and without any motive to sway a Magistrate by a forceful claim as to the high probability that a certain substance is possessed for criminal purposes. If he provided inaccurate data, it does not logically follow that his inaccurate data led to an unreasonable search in this case.

II. *Materiality of paragraph 3(g)(2)*

With respect to the defendants' contention that the erroneous information in paragraph 3(g)(2) was material to a finding of probable cause, the District Court stated (A-321):

> Neither is there any significance in the fact that more of the possible uses of Anthranilic Acid were not recited

> in the Affidavit. Perhaps the use of the word "only" in paragraph 3(g)(2) in a strictly grammatical sense was ill-advised, but nonetheless both legal and illegal uses of Anthranilic Acid are mentioned in that paragraph and it thereby gives basis for a proper inference that either legal or illegal substances could be manufactured.

The government urges that the defendants' concentrated attack on paragraph 3(g)(2) places undue emphasis on the importance of the inferences which could have been drawn by a magistrate who was advised that anthranilic acid, which is not a household product, is used in a wide variety of industrial products. Even assuming that the advice represented by the testimony of Dr. Soa was given to Magistrate Spain, the latter's finding would not rest upon a single component part of the affidavit, but rather upon all of the facts as they are viewed together. This point is well founded within the four corners of the affidavit. On December 11, 1975, the government agent-affiant was aware that anthranilic acid had been delivered to 209 Wolf Road. Thereafter, he learned that anthranilic acid is a precursor to methaqualone, and had, according to a chemist, only limited uses. Despite defense assertions that this information placed much emphasis on the probable illegal use of the acid, the affidavit makes it clear that the affiant-agent pursued information about other precursors and about the activities of the suspects until such information ripened into probable cause. Accordingly, even if there were omissions by the government chemist in his description of the uses of the acid, and these omissions were subject to the scrutiny of the reviewing court, it cannot be said that the information appearing in paragraph 3(g)(2) is material, the term materiality having been defined as an allegation *necessary* to establish probable cause. *United States v. Bridges*, 419 F. 2d 963 (8th Cir., 1969).

Moreover, since Dr. Soa agreed that anthranilic acid is an ingredient in veterinary products and could be found in animal hospitals and on farms, the magistrate would logically discount

the wide variety of uses of the substance when he learned from other paragraphs in the affidavit that the Wilmington Farm Co-Op ordered the substances and that the said Co-Op was fictitious. By way of analogy, a large order of sugar by a bakery might arouse no suspicion, but if the bakery was found to be fictitious, and other evidence tended to establish that the place of delivery of the sugar was an illegal still, then information about other uses of sugar would form no conceivable part of the magistrate's decision on probable cause.

Accordingly, the government submits that District Court was correct in its determination that the alleged misstatements in paragraph 3(g)(2) were immaterial to the finding of probable cause. Materiality aside, the testimony clearly establishes that the affiant acted honestly and without negligence in reporting what he was told. Assuming, arguendo, then that the misstatement in paragraph 3(g)(2) were material, the innocent representation of the affiant of what was told him precludes suppression inasmuch as the standards of reasonableness required by the Fourth Amendment were achieved.

POINT II

The affidavit was sufficient to warrant a finding of probable cause for the issuance of the search warrant.

The principal contention of the defendants (Appellate Brief, page 10), is that the affidavit in support of the search warrant is insufficient because it establishes, at most, that one precursor substance to methaqualone, that is, anthranilic acid, was present at 209 Wolf Road at the time of the application for the warrant. Defendants rely on *United States* v. *Failla*, 343 F. Supp. 831 (W.D.N.Y., 1972), wherein the court held that there was no probable cause to arrest a defendant who (1) ordered and obtained a precursor to amphetamine, that is three pounds of lithium aluminum hydride; (2) used another's name to place the order; (3) maintained a laboratory in his basement, and (4) was

known to have a PhD in chemistry. The court found that ordering a single precursor to amphetamine may constitute a "red flag" to an alert agent, but the totality of circumstances which included ostensibly lawful activities did not develop far enough to permit the discovery of circumstances constituting probable cause.

The government urges that the defendants' reliance on the Failla case is misplaced for several reasons. First, the District Court noted (A-318) that the warrant in the instant case was examined by a magistrate and that the determination of probable cause by the Magistrate could itself be a substantial factor to be considered by a court reviewing the validity of the warrant. Second, the Court found that the quantity and quality of facts alleged in the affidavit under consideration were far greater than in the *Failla* case (A-318 to A-320), wherein the officer made a warrantless arrest.

With respect to the *Failla* case and the issue of precursors, and putting aside for the moment the probative significance of the totality of suspicious and innocent acts, the government contends that the affidavit recites sufficient information about precursors to warrant a finding of probability of the criminal activity alleged in the Affidavit. First, the affidavit established that Craig Newman delivered by truck to 209 Wolf Road, Colonie, New York, 2200 pounds of anthranilic acid. Second, the affidavit establishes that anthranilic acid, which concededly has lawful uses, is a precursor to methaqualone. Third, the Affidavit establishes that to produce methaqualone, one must combine by chemical synthesis anthranilic acid, acetic acid, or acetic anhydride, ortho-toluidine and "chloryl chloride".[3]

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[3]The government, of course, contends that the term "chloryl chloride" was a typographical error, and was substituted for the term "phosphoryl chloride," which would have been the fourth or fifth ingredient of methaqualone and which was properly listed in paragraph 2 of the affidavit (A-19) as an ingredient used in the manufacture of methaqualone.

The affidavit then establishes that Craig Newman, whose phone was used to call Conso Lab Supply Company, New Jersey, in June and July of 1975, obtained from Conso Lab Supply in May 1975, four kilos of anthranilic acid, and on July or August 19, 1975, quantities of ether, sodium, sodium acetate, acetic acid, and acetic anhydride, and further, ordered from Conso Lab Supply in June, 1975 48 kilos of ortho-toluidine.

It is clear, therefore, that the affidavit traces to Craig Newman the ordering or possession of four of the five chemicals which are used in the manufacture of methaqualone. The defendants, contend (appellate brief, page 11), that such recitals about other chemicals are not probative because (a) the possession or ordering of other ingredients four to six months prior to the search constitutes stale information and (b) the ordering or possession of other precursors are not shown to be directly connected with the premises searched.

Although probable cause to justify the issuance of a search warrant must exist at the time of the issuance of the warrant, it is well-recognized that

> the vitality of probable cause cannot be qualified by simply counting the number of days between the occurrence of facts relied upon and the issuance of the affidavit. Together with the element of time we must consider the nature of the unlawful activity. Where the affidavit recites a mere isolated violation it would not be unreasonable to imply that probable cause dwindles rather quickly with the passage of time. However, where the affidavit recites facts indicating activity of a protracted and continuous nature, a course of conduct, the passage of time becomes less significant. *United States* v. *Johnson*, 461 F. 2d 285, 287 (10th Cir., 1972).

Another court, in *United States* v. *Harris*, 482 F.2d 1115 (3rd Cir., 1973), has stated that staleness depends not so much upon the passage of time, but rather on the nature of the activity

in question. Moreover, a case cited by the defendants for another proposition, *United States* v. *Park*, 531 F. 2d 754 (5th Cir., 1976), found significant in analyzing an affidavit in a drug factory case the fact that defendant Park had purchased in the previous *eight months* specified chemicals and equipment which could be used in the manufacture of PCP.

As to the issue of staleness in the instant case, considering the number and amounts of precursors ordered, the identification of Newman as the party obtaining or ordering precursors earlier in time and on December 11, 1975, the frequency of phone calls placed to Conso Lab Supply Company and other laboratory supply companies from the phones of Craig Newman and Peter Lazarski over a period of months and the logical inference which may be drawn from the factual showing in the affidavit that Newman possessed and/or ordered four of the essential precursors to methaqualone, the government submits that the magistrate properly superimposed upon the events immediately preceding the submission to him of the affidavit, the factual information about prior activity such that he could conclude that it was probable in light of other recitals, discussed below, that the anthranilic acid delivered to 209 Wolf Road on December 11, 1975, was to be used in the criminal activity alleged. Additionally, it is clear from those cases concerning unlawful manufacture of narcotics that the court should neither require a showing that every essential precursor chemical was on the premises nor require the government to negate conclusively the probability that the possession of such chemicals, which individually may be innocent substances, was noncriminal. See e.g., *United States* v. *Noreikis*, 482 F. 2d 1777 (7th Cir., 1973); vacated on other grounds, as to one defendant, 415 U.S. 904, (1974); *United States* v. *Moore*, 452 F. 2d 569 (6th Cir., 1971); *United States* v. *Smith*, 499 F. 2d 251, 254 (7th Cir., 1974); *United States* v. *Welebir*, 498 F. 2d 346 (4th Cir., 1974); *United States* v. *Martin*, 509 F. 2d 1211 (9th Cir., 1975).

The Government further submits that the magistrate's responsibility in reviewing the affidavit was to determine whether probable cause existed to believe that the criminal activity alleged, manufacturing or attempting to manufacture a controlled substance, was taking place at 209 Wolf Road. In so determining the issue, the magistrate was required to view the affidavit as a whole and to draw reasonable inferences from the affidavit in light of his experience. Cf. *United States* v. *Pascente*, 387 F. 2d 923 (7th Cir., 1967), cert. den. 390 U.S. 1005; *United States* v. *Melville*, 309 F. Supp. 829 (D.C.N.Y. 1970). Accordingly, expert testimony that chemists often operate in a clandestine manner to protect their research from competitors is not a compelling factor to be considered by a magistrate who draws his experience from the community at large.

An examination of the affidavit's other component parts reveals sufficient information which, viewed as a whole, and coupled with the information about other precursors, warranted the finding of probable cause. First, the affidavit establishes that on December 11, 1975, Craig Newman obtained 2200 pounds of anthranilic acid and used a purchase order in the name of Wilmington Farm Co-Op, 10 Bryant Hill Road, Wilmington, Vermont. Second, the affidavit avers that Wilmington Farm Co-Op, Bryant Hill Road is a fictitious address. Third, Craig Newman used a rented truck to deliver the anthranilic acid to 209 Wolf Road, and after unloading the 20 bags of acid at the premises, returned the truck to the rental agency. Fourth, the affidavit establishes that the resident of the house, Peter Lazarski, was employed as a chemical technician. Fifth, surveillance established that windows were covered with cardboard or by closed blinds. Sixth, the affidavit established that on December 11, 1975, a car registered to one Neil Winner arrived at the premises and that from the telephone of Neil Winner there were calls to four chemical companies in July, 1975. Seventh, the affidavit established that on or about July 7, 1975, the BASF Wyandotte Corporation, New Jersey, sold 440 pounds of

anthranilic acid to a party acting on behalf of the Wilmington Farm Co-Op, Bryant Hill Road, Wilmington, Vermont.

While it is clear that many of the foregoing acts are innocent acts, it is well recognized that corroborating information in an affidavit for search warrant or within an arresting's officer's possession, may be made up of innocent or lawful acts. In *Newcomb* v. *United States*, 327 F. 2d 649 (9th Cir., 1964), the Court stated:

> The question is what probative force they (lawful or innocent acts) have, not individually, but collectively, and as they fit into the jigsaw pattern of the entire picture. Id, at 651.

In *Rubio* v. *United States*, 404 F. 2d 678 (7th Cir., 1968) the Court states,

> a probable cause conclusion may be drawn from the gestalt which a factual situation presents; that is, such a conclusion may be deducted from separate facts as they interrelate, even though such a conclusion could not be reached if the separate facts were evaluated on an individual basis.

In *Martin*, supra, the 9th Circuit said at p. 1213;

> We think that this is a case, like *United States* v. *Patterson*, 9th Cir., 1974, 492 F. 2d 995, 997, in which "[t]he succession of superficially innocent events had proceeded to the point where a prudent man could say to himself that an innocent course of conduct was substantially less likely than a criminal one."

In the instant case, having superimposed the recent information set forth in the affidavit upon the information that most of the precursors to methaqualone had been purchased or ordered by Newman some months before, the magistrate could draw a reasonable inference that the anthranilic acid was to be used in an unlawful activity at the premises as alleged. The anthranilic acid was purchased in a suspicious manner, and

delivered to a private dwelling bearing no apparent connection with a farm cooperative or commercial enterprise; the premises was the residence of a chemist, whose phone toll records showed calls to Conso Lab Supply Company, at which other precursors were purchased some months before; the truck in which the anthranilic acid was delivered was returned to the rental agency, giving rise to logical inferences that the destination of Newman had been reached and that the substance was not to be used for the purpose for which it was ordered. See *Park*, supra, at 759. The inference is strengthened by the recited fact that the bags were not removed from the premises during surrveillance. During surveillance, a third party, purported to be Neil Winner, entered the house, and his phone records showed calls to chemical companies. The windows of the house were covered by cardboard or blinds.

In sum, viewing the totality of the circumstances, and considering the logical inferences, the magistrate could reasonably find probable cause to issue a search warrant.

Finally, the government submits that the defendants' attack upon the search warrant rests mainly upon the admitted imprecision of government agents. Such an attack, however, is not in accord with the judicial policy which favors search warrants. In *United States* v. *Ventresca*, 85 S.Ct. 741, (1965) the Supreme Court wrote:

> where circumstances are detailed, where reason for crediting the source of the information is given, and when a Magistrate has found probable cause, the Courts should not invalidate the warrant by interpreting the affidavit in a hypertechnical rather than a commonsense manner. Although in a particular case it may not be easy to determine when an affidavit demonstrates the existence of probable cause, the resolution of doubtful or marginal cases in this area should be largely determined by the preference to be accorded to warrants. 380 U.S. at 110.

In this Circuit, the Court of Appeals has reiterated the principle of the *Ventresca* case in *United States* v. *Freeman*, 358 F. 2d 459 (1966), cert. den. 385 U.S. 882. The Court added, at 461,

> The standard to be used in reaching a determination must not be so stringent nor so technical as to discourage the use of search warrants.

POINT III

Hearsay declarations were not improperly included within the affidavit.

The defendants contend (Appellate brief, p. 15) that hearsay declarations of chemist DeZan, Northeast Regional Laboratory; Richard Pratt, Chief of Police, Wilmington, Vermont; and a Vermont telephone authority, were included in the affidavit without further discussion of (1) "the underlying circumstances" necessary to enable the magistrate to judge the validity of the declarations and (2) specific facts from which it may be determined that the declarants were reliable or credible. Defendants rely on *Aguilar* v. *Texas*, 387 U.S. 108 (1964); *Spinelli* v. *United States*, 393 U.S. 410 (1969); and *United States* v. *Karathanos*, 531 F. 2d 26 (2d Cir., 1976).

First, the government points out that each of the cases cited by defendants concerned information provided by informers. In *United States* v. *Burke*, 517 F. 2d 377 (2d Cir., 1975), this Court stated:

> there has been a growing recognition that the language in *Aguilar* and *Spinelli* was addressed to the particular problem of professional informers and should not be applied in a wooden fashion to cases where information comes from an alleged victim of or witness to a crime.

The rationale of *Aguilar* - *Spinelli* is further set forth in *United States* v. *Bell*, 457 F. 2d 1231, 1238-39 (5th Cir., 1972):

> The rationale behind requiring a showing of credibility and reliability is to prevent searches based upon an unknown informant's tip that may not reflect anything more than idle rumor or irresponsible conjecture. . . . Many informants are intimately involved with the persons informed upon and with the illegal conduct at hand, and this circumstance could also affect their credibility. . . . Thus we conclude that *Aguilar* and *Spinelli* requirements are limited to the informant situation only.

The *Ventresca* case, supra, clearly recognized, 380 U.S. 108, at 111, that reports or observations of fellow officers of the government engaged in a common investigation are plainly a reliable basis for a warrant applied for by one of their number.

Second, it is well-settled that affidavits of probable cause are tested by much less rigorous standards than those governing the admissibility of evidence at trial. *McCray* v. *Illinois*, 386 U.S. 300, 311 (1967). In the instant case, the information received from a Vermont telephone authority, concedely recorded as a conclusion, is in the nature of a negative business entry; the information from Rich Pratt, a fellow officer, is derived from one in the position to know the information sought and was submitted to Agent Tripp for inclusion in an affidavit during the course of rapidly moving criminal investigation. Accordingly, those parts of the affidavit should be tested in a common sense and realistic fashion. *Ventresca*, supra, 380 U.S. at 108. Finally, Paul DeZan is identified by name and as a chemist of the U.S. Department of Justice, Northeast Regional Laboratory, from whom information was received about the ingredients of methaqualone and uses of anthranilic acid. A discussion of his qualifications was not set forth in the affidavit. In accord with the *McCray* doctrine, the government submits there is no rule of law requiring that an evidentiary foundation be laid in an affidavit prior to a magistrate's considering the information therein. To require a legal evidentiary foundation for each

recorded report or observation of a police officer, expert, or citizen-witness, would expand the affidavit into a complex legal document containing collateral matters not germane to the issue of probable cause at hand, and would place an insurmountable drafting burden upon agent-affiants who are not lawyers, and are themselves generally engaged in the on-going and hasty investigation.

CONCLUSION

For the foregoing reasons, the Memorandum Decision and Order of the District Court, relating to defendants' motions for suppression of evidence, and the Judgment of conviction appealed from should be affirmed.

Respectfully submitted,

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Affidavit of Service

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Re: U.S. VS. LAZARSKI ETAL -- U.S. VS MC DONALD

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Attorney(s) for
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Commission Expires March 30, 1978